Supreme Court, U.S.
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No. 82-706

In the

Supreme Court of the United States

October Term, 1982

Charles Tillman ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE INITIAL STOP AND DETENTION OF THE PETITIONER VIOLATED HIS RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II.

WHETHER THE SEARCH OF THE AUTOMOBILE VIOLATED THE PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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OPINION BELOW

The opinion of the Arkansas Supreme Court is found at 275 Ark. 275, 630 S.W.2d 5 (1982), and is reproduced in Appendix B of the petition at pages A-15 through A-23, inclusive, immediately following the reproduction of the dissent in Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED
(In addition to those cited by the petitioner)

Rule 2.1, Arkansas Rules of Criminal Procedure, Ark. Stat. Ann., Vol 4A (Repl. 1977), provides:

> For the purposes of this Article, unless the context otherwise plainly requires:

> "Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

Rule 3.1, Arkansas Rules of Criminal Procedure, Ark. Stat. Ann., Vol. 4A (Repl. 1977), provides:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

STATEMENT OF THE CASE

The respondent is generally satisfied with the petitioner's statement of the case, but supplies the following deficiencies in it.

The unnamed and unknown informant who told Officer Swint about the presence of the petitioner and his cohorts in the area in which they were first seen stated not only that the three looked as if they were reconnoitering residences, but also that they looked as though they were about to burglarize a house Swint knew to be owned by Mr. George Brown. Swint regularly patrolled the area, going there on the average of every other day, and knew most of its residents. The area is sparsely populated, and Swint was aware of a rather high incidence of burglary in the area at that time. He had never seen a car such as that in which the petitioner and his companions were traveling in the area before.

Swint radioed another officer to investigate the Brown residence and then followed the petitioner and his cohorts into Pulaski County, which was very close by.

When he gained the assistance of a Pulaski County sheriff's deputy, Swint stopped the three and handcuffed them and put them in the back seat of his patrol car. He then received word via the radio that the Brown residence had, indeed, been burglarized and that a large number of silver serving pieces had been taken.

Swint then searched the car, including the trunk. In the trunk he found two garment bags, one of which was partially unzipped and clearly packed with articles of a silver service.

At this point the petitioner was arrested for burglary and theft of property.

REASONS FOR DENYING THE WRIT

The argument upon which most emphasis is placed can be stated in a nutshell as follows: because there was neither probable cause for an arrest, nor reasonable suspicion for an investigatory stop to justify Officer Swint's initial stop of the petitioner and his cohorts, the evidence seized as a result of the stop should have been suppressed as the fruit of the poisonous tree in accordance with *Wong Sun v. United States*, 371 U.S. 471 (1963). The decision of the Arkansas Supreme Court holding otherwise is said to be erroneous.

The respondent cannot agree and submits in response that the initial stop was justified as an investigatory stop. After the stop was accomplished and the petitioner and his companions secured, probable cause to search the automobile in which the three had been traveling arose when Swint learned from another officer via radio communication that the Brown residence had in fact been burglarized and silver serving pieces stolen.

Officer Swint's reasonable suspicion or legal cause to make an investigatory stop was based on several facts. First was the tip from the unknown informant that the petitioner and his two companions were apparently reconnoitering residences in an area known to Swint to have been plagued by a recent rash of burglaries. The neighborhood was a sparsely populated rural neighborhood, most of the residents of which were personally known to Swint. The automobile in which the three men were traveling, a brown Cadillac bearing the personalized Arkansas license plate of "FOXY BT", was also known to Swint not to belong in the neighborhood. The informer also stated that the three looked as if they were about to burglarize the house known to Swint as the home of Mr. George Brown.

The respondent notes at this juncture the petitioner's attempt to apply to this tip the two pronged test for

affidavits for search warrants in which hearsay appears announced in *Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964). The tip in this case is not relied upon for probable cause to search. *Aguilar* and *Spinelli* are, therefore, inapposite. The petitioner has cited no authority holding that law enforcement officers must subject such volunteered information to such rigorous scrutiny in order to use it for purposes of an investigatory stop, and the respondent knows of none. Because the *Aguilar-Spinelli* test is concerned with probable cause to search, a standard higher than that set for the reasonable suspicion of criminal activity needed to make an investigatory stop, the lack of authority applying that test to reasonable suspicion and investigatory stops is not surprising.

In any event, the tip proved to be reliable, for when Swint arrived in the neighborhood, the petitioner's automobile was observed in a position consistent with just having backed out of the Brown residence. Rather than allow the automobile to leave the area entirely and become unavailable while investigating the Brown residence for evidence of illegal entry, Swint followed the automobile at a discreet distance while radioing police headquarters to have another officer make sure of that of which Swint was virtually certain—the burglary of the Brown residence and the theft of property therein.

Swint followed the automobile into the next county, which was very close, and stopped the petitioner and his cohorts after gaining the assistance of a sheriff's deputy from that county.

This stop was justified as an investigatory stop; that is, Swint had a reasonable suspicion at this point of criminal activity, i.e., burglary and theft. As stated by this Court in *United States v. Brignoni-Ponce*, 442 U.S. 873 (1975), citing *Adams v. Williams*, 407 U.S. 143 (1972) at 145, 146 and quoted by the Arkansas Supreme Court:

> *A brief stop* of a suspicious individual, *in order* to determine his identity or *to maintain the status quo momentarily while obtaining more information*, may be most reasonable in light of the facts known to the officer at the time. (Emphasis supplied.) 422 U.S. 881.

The stop now in question is nothing more. Based on the facts set out above and the knowledge Swint had of the area without further investigation, Swint had much more than a hunch of criminal activity.

He had a rather strong suspicion of burglary and theft based on objective manifestations of such set out above, as required by *United States v. Cortez*, 449 U.S. 411 (1981), also cited and quoted by the Arkansas Supreme Court, and not based only on that subjective, visceral feeling known in the vernacular as a hunch.

Contrary to the petitioner's assertion, the petitioner was not arrested at this point. It might well be that Swint used the word, arrest, in his testimony in describing what he did at this point, but Swint is hardly authority enough to label this detention an arrest as a matter of law. Two state courts have found otherwise and there appear no exceptional circumstances here present to warrant this Court's non-acceptance of those factual findings. In this regard see *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Probable cause to search the automobile in accordance with *Carroll v. United States*, 267 U.S. 132 (1925), arose when Swint received word confirming his suspicion that the Brown residence had been burglarized and silver serving pieces stolen from within. As stated by the Arkansas Supreme Court, probable cause to search an automobile pursuant to *Carroll, supra*, does not evaporate simply because the automobile is stopped and its occupants under control for the time being. In this regard see *Chambers v. Maroney*, 399 U.S. 42 (1970).

The petitioner also contends, assuming as fact that the garment bags in which the silver was packed were all zipped closed when Swint looked into the trunk of the automobile, that the search of the garment bags was in contravention of the Fourth Amendment as construed in the recent case of *Robbins v. California*, 453 U.S. 420 (1981).

Robbins applies to the case at hand if, and only if, it is taken as fact that the garment bags were totally closed at the time Swint viewed them, but this cannot be assumed. Because both the state trial court and the Arkansas Supreme Court found as a fact that one of the bags was partially unzipped, it cannot be said that the bags were searched or that *Robbins* applies.

As stated in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra*, at 445 U.S. 111-112:

> . . . we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160, 97 L.Ed. 168, 73 S.Ct. 204 (1952).

The two major exceptions to this rule were aptly stated as follows in *Fiske v. Kansas*, 274 U.S. 380, 385 (1927):

> . . . where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

See, also, generally, *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Whitus v. Georgia*, 385 U.S. 545 (1967).

Because neither exception is applicable here, the fact is that one of the bags was partially unzipped and the silver in plain view. Thus, *Robbins* is inapposite.

The respondent notes in closing that, inasmuch as this Court is not the proper forum for the advancement of Arkansas law, the argument concerning the same is misplaced in this petition.

The respondent submits without further ado that the petition filed herein does not warrant the issuance of a writ of certiorari.

CONCLUSION

Rule 17, Rules of the Supreme Court of the United States, sets out several considerations that go into the decision as to whether to issue a writ of certiorari to a state's court of last resort. The petitioner claims none of these grounds as his own and the reason why is that none of them apply. The petitioner seeks certiorari not for these reasons, but only because the outcome in the state court was not to his liking. As a result the petition should be denied.

Respectfully submitted,

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